

END USER LICENSE TERMS AND CONDITIONS

1. DEFINITIONS

“Affiliate” means any entity that directly or indirectly controls, is controlled by, or is under common control with the subject entity. “Control,” for purposes of this definition, means direct or indirect ownership or control of more than 50% of the voting interests of the subject entity.

“Agreement” means the agreement dated _____, 20__ by and between Houghton Mifflin Harcourt Publishing Company and Texas Department of Information Resources Customer (Customer), including these End User License Terms and Conditions.

“Documentation” means our online user guides, documentation, and help and training materials, as updated from time to time.

“Malicious Code” means code, files, scripts, agents or programs intended to do harm, including, for example, viruses, worms, time bombs and Trojan horses.

“Non-Choice Applications” means a web-based or offline software application that is provided by you or a third party and interoperates with a Service, including, for example, an application that is developed by or for you.

“Order” means an ordering document specifying the Services to be provided hereunder that is entered into between you and us or any of our Affiliates, including the Agreement, and any addenda and supplements thereto.

“Products” means the specific version(s) of the information and products provided to you pursuant to an Order, as more fully described in the Documentation, and all corrections, modifications, enhancements, and updates to such software that We may provide to You under the Agreement or any agreed upon maintenance agreement. “Products” exclude Non-Choice/Non-HMH Applications.

“Services” means the deliverables that We are contracted to deliver under the Agreement for You. We shall provide such services and deliverables to You under the Agreement pursuant to a mutually agreed upon Statement of Work. Any professional services outside the scope of such mutually agreed upon SOW shall be provided by Us at our then-current, standard time and materials rates.

“User” means an individual user, teacher, administrator or employee who is authorized by you to use the Products and the Services, for whom you have ordered the Products and the Services, and to whom you (or we at your request) have supplied a user identification and password.

“We,” “Us” or “our” means Choice Solutions, a division of Houghton Mifflin Harcourt Publishing Company.

“You” or “your” means the Customer in accordance with Appendix A, Section 3A of DIR Contract No. DIR-TSO-3426.

“Your Data” means electronic data and information submitted by or for you related to the Products and Services or collected and processed by or for you using the Products and the Services, excluding Non-Choice Applications.

2. PROPRIETARY RIGHTS AND LICENSES

2.1. License to Use Products. We grant to you a worldwide, non-transferable, non-exclusive, time-based license, under our applicable intellectual property rights and licenses, to use the Products and Services acquired by You pursuant to the Agreement, subject to DIR Contract No. DIR-TSO-3426, these Terms and Conditions and the Documentation. You may not distribute copies of the Products to third parties without our explicit and unambiguous written permission. This is an internal use license solely for use by the school district and its Users and authorized contractors.

2.2. License by you to Host your Data and Applications to Perform Services. You grant us and our Affiliates a worldwide, limited-term license to host, copy, transmit and display your Data, and any Non-Choice/Non-HMH Applications and program code created by or for you under the Agreement, as necessary for us to provide services in accordance with the Agreement. Subject to the limited licenses granted herein, we acquire no right, title or interest from you or your licensors under this Agreement in or to your Data or any Non-Choice/Non-HMH Application or program code.

2.3. License by you to Use Feedback. You grant to us and our Affiliates a worldwide, perpetual, irrevocable, royalty-free license to use and incorporate any suggestion, enhancement request, recommendation, correction or other feedback provided by you or Users relating to the Products and Services.

2.4. Reservation of Rights. Subject to the limited rights expressly granted hereunder, we and our licensors reserve all of our/their right, title and interest in and to the Services and Product, including all of our/their related intellectual property rights. No rights are granted to you hereunder other than as expressly set forth herein. You may not decompile or disassemble the compiled software components in the Products. You acknowledge and agree that the structure, sequence and organization of the Product are the valuable trade secrets of Houghton Mifflin Harcourt and its suppliers. You agree to hold such trade secrets in confidence.

2.5. Maintenance of Copyright Notices. You must not remove or alter any copyright notices on any copies of the Products.

3. USE OF PRODUCTS AND SERVICES.

3.1. Your Responsibilities. Unless otherwise provided in the Agreement, You will (a) be responsible for Users' compliance with this Agreement, (b) be responsible for the accuracy, quality and legality of your Data and the means by which you acquired your Data, (c) be responsible for setting up and customizing all User permissions and features of the Service and for your individual Users and terminating or editing your User permissions when a User's responsibilities no longer require access, (d) use reasonable efforts to prevent unauthorized access to or use of Services and Products, and notify us promptly of any such unauthorized access or use, (e) use Services and Products only in accordance with the Documentation and applicable laws and government regulations, including without limitation the Family Educational Rights and Privacy Act, (f) comply with terms of service of Non-Choice/Non-HMH Applications with which you use Services or Products. We are not responsible for any losses associated with your failure to effectively maintain User permissions and administrative settings. Unless otherwise specified in the Agreement, a User's password may not be shared with any other individual, and a User identification may be reassigned to a new individual replacing one who no longer requires ongoing use of the Services or Products.

3.2. Usage Restrictions. You will not (a) make any Services or Products available to, or use any Services or Products for the benefit of, anyone other than you or your authorized Users, (b) sell, resell, license, sublicense, distribute, rent or lease any Services or Products, or include any Services or Products in a service bureau or outsourcing offering, (c) use Services or Products to store or transmit infringing, libelous, or otherwise unlawful or tortious material, or to store or transmit material in violation of third-party privacy rights, (d) use Services or Products to store or transmit Malicious Code, (e) interfere with or disrupt the integrity or performance of any Services or Products or third-party data contained therein, (f) attempt to gain unauthorized access to any Services or Products or its related systems or networks, (g) permit direct or indirect access to or use of any Services or Products in a way that circumvents a contractual usage limit, (h) copy Services or Products or any part, feature, function or user interface thereof, except as permitted herein or in an Order or the Documentation, (j) access any Services or Products in order to build a competitive product or service, or (k) reverse engineer any Services or Products (to the extent such restriction is permitted by law).

3.5. Removal of Non-Choice Applications. If we receive information that a Non-Choice/Non-HMH Application hosted may violate applicable law or third-party rights, we may so notify you and in such event you will promptly disable such Non-Choice/Non-HMH Application or modify the Non-Choice/Non-HMH Application to resolve the

potential violation. If you do not take required action in accordance with the above, we may disable the applicable Products, Services and/or Non-Choice/Non-HMH Application until the potential violation is resolved.

4. NON-CHOICE/NON-HMH PROVIDERS; FUTURE FUNCTIONALITY

4.1. Acquisition of Non-Choice/Non-HMH Products and Services. We or third parties may make available third-party products or services, including, for example, Non-Choice/Non-HMH Applications and implementation and other consulting services. Any acquisition by you of such non-Choice/non-HMH products or services, and any exchange of data between you and any non-Choice/non-HMH provider, is solely between you and the applicable non-Choice/non-HMH provider. We do not warrant or support Non-Choice/Non-HMH Applications or other non-Choice/non-HMH products or services, except as specified in an Order.

4.2. Non-Choice/Non-HMH Applications and your Data. If you install or enable a Non-Choice/Non-HMH Application for use with a Service, you grant us permission to allow the provider of that Non-Choice/Non-HMH Application to access your Data as required for the interoperation of that Non-Choice/Non-HMH Application with the Service. We are not responsible for any disclosure, modification or deletion of your Data resulting from access by a Non-Choice/Non-HMH Application installed or enabled by You.

4.3. Future Functionality. You agree that your purchases and licenses are not contingent on the delivery of any future functionality or features, or dependent on any oral or written public comments made by us regarding future functionality or features.

5. OUR RESPONSIBILITIES

5.1. Protection of Your Data. We will maintain administrative, physical, and technical safeguards for protection of the security, confidentiality and integrity of Your Data when such Data is in Our possession and control, as described in the Documentation. Those safeguards will include, but will not be limited to, measures for preventing access, use, modification or disclosure of your Data by our personnel except (a) to provide the Products and the Services and prevent or address service or technical problems, (b) as compelled by law in accordance with Section 7.3 (Compelled Disclosure) below, or (c) as You expressly permit in writing.

5.2. Our Personnel. We will be responsible for the performance of our personnel (including our employees and contractors) and their compliance with our obligations under this Agreement, except as otherwise specified herein.

6. SUPPORT AND MAINTENANCE

6.1. Support. After the expiration of the warranty period provided in Section 8.2, for each version of the Product provided We will provide standard Customer Support services as follows. We shall only be obligated to provide support for the then-current version of the Product(s) and to support the immediately prior release for a period of twelve (12) months after the release of the then-current production version or discontinuance of the Product line.

- Customer Support – Level 2 and Level 3 support (as defined below) from Our Project Manager on-call during regular business hours, Monday through Friday, excluding holidays. "Level 2 Support" means the service provided to analyze or reproduce the reported problem or to determine that the reported problem is not reproducible. "Level 3 Support" means the service provided to isolate the reported problem to a component level of the Products, provided such reported problem is reproducible by You or Us and does not relate to enhancements or other modifications made by You. Our obligations with respect to Level 3 Support are contingent upon proper use and application of the Products in accordance with applicable specifications and does not cover repair or replacement caused by negligence, alterations, or modifications not approved by Us, or maintenance or repair not performed by Us.
- Access to EdFusion's help system and Documentation.

6.2. Updates. "Update" means a release of the Products made generally available to a customer and which contains minor functional enhancements and/or error corrections. The content and timing of all Updates shall be decided upon by Us in its sole discretion. An update is represented by a release number change immediately to the right of the decimal point in the Product's version number. Such updates may affect the Products' features, functionality, and components. Software features, functionality, and components may be added, deactivated temporarily, altered, or permanently removed by us without notice to you; provided that features and functionality will not be removed or materially diminished without an equivalent alternative being provided at no additional charge. As updated versions of the Products are installed by us for access and use by you and your Users under these Terms and Conditions, and to the extent that such updates do not constitute a new and unique product such versions, updates and enhancements will become part of the Products governed by this Agreement.

6.3. Maintenance (Upgrades). If You elect Maintenance as provided in the Agreement or in an Order, then We will provide Upgrades to the Product(s) as follows. "Upgrade" means a version of the Products made generally available to all customers and which contains substantial functional enhancements. The content and timing of all Upgrades shall be decided upon by Us in Our sole discretion. We expressly disclaim any responsibility to provide Upgrades for changes in applicable federal, state, or local regulations or legislation or reporting requirements unless such changes are specifically contracted by a customer. An Upgrade is represented by a version number change immediately to the left of the decimal point in the Product's version number. All decisions concerning the correction of errors and the implementation of corrections, fixes, patches, new versions, and/or work-around solutions, including, without limitation, the timing thereof, shall be made by us in our judgment and discretion.

7. CONFIDENTIALITY

7.1. Definition of Confidential Information. "Confidential Information" means all information disclosed by a party ("Disclosing Party") to the other party ("Receiving Party"), whether orally or in writing, that is designated as confidential or that reasonably should be understood to be confidential given the nature of the information and the circumstances of disclosure. Your Confidential Information includes your Data; our Confidential Information includes the Services and Products; and Confidential Information of each party includes technology and technical information, and product plans and designs disclosed by such party. However, Confidential Information does not include any information that (i) is or becomes generally known to the public without breach of any obligation owed to the Disclosing Party, (ii) was known to the Receiving Party prior to its disclosure by the Disclosing Party without breach of any obligation owed to the Disclosing Party, (iii) is received from a third party without breach of any obligation owed to the Disclosing Party, or (iv) was independently developed by the Receiving Party.

7.2. Protection of Confidential Information. To the extent allowable under the Texas Public Information Act and subject to any legal requirements, the Receiving Party will use the same degree of care that it uses to protect the confidentiality of its own confidential information of like kind (but not less than reasonable care) (i) not to use any Confidential Information of the Disclosing Party for any purpose outside the scope of this Agreement, and (ii) except as otherwise authorized by the Disclosing Party in writing, to limit access to Confidential Information of the Disclosing Party to those of its and its Affiliates' employees and contractors who need that access for purposes consistent with this Agreement and who have confidentiality obligations to the Receiving Party containing protections no less stringent than those herein

7.3. Compelled Disclosure. The Receiving Party may disclose Confidential Information of the Disclosing Party to the extent compelled by law to do so, provided the Receiving Party gives the Disclosing Party prior notice of the compelled disclosure (to the extent legally permitted) and reasonable assistance, at the Disclosing Party's cost, if the Disclosing Party wishes to contest the disclosure.

8. REPRESENTATIONS, WARRANTIES, EXCLUSIVE REMEDIES AND DISCLAIMERS

8.1. Representations. Each party represents that it has validly entered into this Agreement and has the legal power to do so.

8.2. Our Warranties. We warrant for a period of 90 days from the initial delivery of the Products and Services, that the Products and the Services will substantially conform to the specifications in the Documentation and the Agreement. In addition, We warrant that (a) this Agreement and the Documentation accurately describe the applicable administrative, physical, and technical safeguards for protection of the security, confidentiality and integrity of your Data, (b) subject to Section 5.2 (Non-Choice/Non-HMH Applications), we will not materially decrease the functionality of the Products, and (c) the Services and Products will not introduce Malicious Code into your systems. For any breach of an above warranty, your exclusive remedies are those described in Sections 11.2 (Termination) and 11.3 (Effect of Termination).

8.3. Your Warranties. You warrant that you will comply with all applicable laws and regulations regarding the use of the Products and Services.

8.4. Disclaimers. EXCEPT AS EXPRESSLY PROVIDED HEREIN, NEITHER PARTY MAKES ANY WARRANTY OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, AND EACH PARTY SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW. PRODUCTS AND SERVICES ARE PROVIDED "AS IS," EXCLUSIVE OF ANY WARRANTY WHATSOEVER. EACH PARTY DISCLAIMS ALL LIABILITY AND INDEMNIFICATION OBLIGATIONS FOR ANY HARM OR DAMAGES CAUSED BY ANY THIRD-PARTY HOSTING PROVIDERS.

11. TERM AND TERMINATION

11.1 Term of Agreement. This End User Agreement commences on the date set forth in the Agreement and continues until all licenses hereunder have expired or have been terminated.

11.2. Termination. Terminations shall be handled in accordance with Appendix A, Section 11B of DIR Contract No. DIR-TSO-3426.

11.3. Effect of Termination. If this Agreement is terminated by us in accordance with Section 11.2, you will pay any unpaid fees for the Services and the Products. In no event will termination relieve you of your obligation to pay any fees due and payable to us (including for Services rendered) for the period prior to the effective date of termination.

11.4. Your Data Portability and Deletion. Upon request by you made within 30 days after the effective date of termination or expiration of this Agreement, we will make your Data available to you for export or download as provided in the Documentation. After that 30-day period, we will have no obligation to maintain or provide your Data, and will thereafter delete or destroy all copies of your Data in our systems or otherwise in our possession or control as provided in the Documentation, unless legally prohibited.

11.5. Surviving Provisions. The Sections titled "Payment," "Proprietary Rights and Licenses," "Use of Products and Services," "Confidentiality," "Disclaimers," "Refund or Payment upon Termination," and "Portability and Deletion of your Data," will survive any termination or expiration of this Agreement.

12. PAYMENT

12.1. License Fees. In consideration of the licenses granted in Section 2, You hereby agree to pay to Us the license fees specified in the Order in accordance with Appendix A, Section 8J of DIR Contract No. DIR-TSO-3426 and Appendix C, Pricing Index of DIR Contract No. DIR-TSO-3426, and. Nothing contained in any district purchase order You may submit will modify or add to the terms of the Agreement.

12.2. Maintenance and Support Fees. If maintenance and support services are ordered by you, You hereby agree to pay to Us the maintenance and support fees in accordance with Appendix A, Section 8J of DIR Contract No. DIR-TSO-3426 and Appendix C, Pricing Index of DIR Contract No. DIR-TSO-3426,

12.3. Taxes. Taxes will be handled in accordance with Appendix A, Section 8E of DIR Contract No. DIR-TSO-3426.

13. GENERAL

13.1. Force Majeure. Force Majeure will be handled in accordance with Appendix A, Section 11C of DIR Contract No. DIR-TSO-3426.

13.2. Non-Assignment. Neither party may assign or otherwise transfer rights or obligations under this Agreement, whether in whole or in part, without the other party’s prior written consent.

13.3. Relationship Between the Parties. The parties shall act as independent contractors. Except as may be otherwise expressly permitted hereunder, neither party will represent that it has any authority to assume or create any obligation, express or implied, on behalf of the other party, or to represent the other party as agent, employee, or in any other capacity.

13.4. Partial Invalidity; Waiver. If any provision of this Agreement shall be declared void, illegal, or unenforceable, the remainder of this Agreement shall be valid and enforceable to the extent permitted by applicable law, provided that the intent of the parties is not materially impaired. The parties shall use their best efforts to replace the invalid or unenforceable provision by a provision that, to the extent permitted by applicable law, achieves the purposes intended under the invalid or unenforceable provision. No failure of either party to exercise any power or right hereunder or to insist upon strict compliance with the terms of this Agreement, and no custom or practice of the parties at variance with the terms hereof, shall constitute a waiver of either party's right to demand exact compliance with the terms of this Agreement

HOUGHTON MIFFLIN HARCOURT (HMH)

CUSTOMER

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____